1907
January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PARBATI KUNWAR AND OTHERS (DEFENDANTS), *v.* MAHMUD FATIMA AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, section 45—Misjoinder of causes of action—Multifariousness—Property claimed under one title from defendants professing to hold under various titles.

The plaintiffs sued as heirs of their father to recover various portions of their father's estate from the hands of different alienees. *Held* that the fact that the defendants set up different titles to the various portions held by them would not make the suit bad for multifariousness. The plaintiffs had one cause of action, namely, the right on the death of their father to recover their shares of his property. *Ganeshi Lal* v. *Khairati Singh* (1) distinguished. *Ishun Chunder Hazra* v. *Rameswar Mondol* (2), *Nundo Kumar Nasker* v. *Banomali Gayan* (3), *Indar Kuar* v. *Gur Prasad* (4) and *Mazhar Ali Khan* v. *Sajjad Husain Khan* (5) referred to.

THE facts of the case out of which the present appeal arises are as follows :—

One Kazi Ahmad Husain, who was the owner and in possession of the entire village of Yasinnagar and also of a ten biswa share in the village of Khardauli and of some bighas of resumed *muafi* land in another village, died on the 2nd of August 1892, leaving his widow, the first defendant, and the defendants Husain Ahmad and Muhammad Ahmad, two sons, and the plaintiffs, his two daughters, him surviving. After his death in satisfaction of a decree obtained by one Gandharp Singh, 5 biswas of Yasinnagar and 5 biswas of Khardauli and a third of the *muafi* land were foreclosed and possession delivered over to the judgment-creditor. Later on, namely, on the 18th of January 1899, a further share in the village of Yasinnagar was sold by the widow and two sons to the defendants 6, 7 and 8 and another party, the ancestor of the defendant No. 5. Again, under a sale-deed, dated the 25th of July 1904, a 5 biswa share in the village of Khardauli was transferred to the defendants 5 and 7. The suit out of which this appeal has arisen was instituted on the 12th of September 1904, by the plaintiffs as two of the heirs of

*Second Appeal No. 1074 of 1905 from a decree of B. J. Dalal, Esq., District Judge of Mainpuri, dated the 30th of June 1905, confirming a decree of Aziz-ur-Rahman, Esq., Subordinate Judge of Mainpuri, dated the 31st of March 1905.

(1) (1894) I. L. R., 16 All., 279.
(2) (1897) I. L. R., 24 Calc., 831.
(3) (1902) I. L. R., 29 Calc., 871.
(4) (1888) I. L. R., 11 All., 33.
(5) (1902) I. L. R., 24 All., 358.

1907

PARBATI KUNWAR v. MAHMUD FATIMA.

Ahmad Husain to recover from the defendants 14 out of 48 *sihams* of the property which had passed into the hands of the judgment-creditor and transferees respectively under the decree and deeds of transfer referred to above.

The Court of first instance (Subordinate Judge of Mainpuri), decreed the plaintiff's claim, and the lower appellate Court (District Judge of Mainpuri), upheld the decision of the Court of first instance.

From this decree the defendants appealed to the High Court.

Mr. *M. L. Agarwala*, Mr. *Muhammad Ishaq Khan*, Qazi *Muhammad Zahur* and Babu *Surendra Nath Sen*, for the appellants.

Pandit *Bhagwan Din Dube*, for the respondents.

STANLEY, C. J., and BURKITT, J.— The facts of this case are shortly as follows:—One Kazi Ahmad Husain who was the owner and in possession of the entire village of Yasinnagar and also of a 10 biswa share in the village of Khardauli and of some bighas of resumed *muafi* land in another village, died on the 2nd of August 1892, leaving his widow, the first defendant, and the defendants Husain Ahmad and Muhammad Ahmad, two sons, and the plaintiffs, his two daughters, him surviving. After his death in satisfaction of a decree obtained by one Gandharp Singh 5 biswas of Yasinnagar and 5 biswas of Khardauli and a third of the *muafi* land were foreclosed and possession delivered over to the judgment-creditor. Later on, namely, on the 18th of January 1899, a further share in the village of Yasinnagar was sold by the widow and two sons to the defendants 6, 7 and 8 and another party, the ancestor of the defendant 5. Again, under a sale-deed, dated the 25th of July 1904, a 5 biswa share in the village of Khardauli was transferred to the defendants 5 and 7. The suit out of which this appeal has arisen was instituted on the 12th of September 1904, by the plaintiffs as two of the heirs of Ahmad Husain to recover from the defendants 14 out of 48 *sihams* of the property which had passed into the hands of the judgment-creditor and transferees respectively under the decree and deeds of transfer to which we have referred.

The Court of first instance decreed the plaintiff's claim and the lower appellate Court upheld the decision of the Court of first instance.

This appeal has been preferred on two grounds, the first being that the suit is bad for misjoinder of causes of action, and the second that an application made for mutation of names during the life-time of Kazi Ahmad Husain on the 28th of June 1892 was admissible in evidence, and clearly established that a gift of the whole village of Yasinnagar had been made by Kazi Ahmad Husain to his widow and two sons, and that therefore the plaintiffs had no interest in this village.

We shall first deal with the last question. In proof of the alleged gift the defendants adduced in evidence a petition which was filed by Ahmad Husain during his life. It runs as follows :—"I, Ahmad Husain, am zamindar of Yasinnagar, whole 20 biswas, and remain sick. So out of the said zamindari I have given 5 biswas to each of my sons and 10 biswas to my wife Barkat Fatima and have made over possession to them. I pray that mutation of names may take place." In addition to this petition two witnesses were examined to prove the alleged gift. The learned District Judge found after consideration of the evidence that Yasinnagar was not given as a gift to the plaintiffs' brothers and mother. It was contended before him that the petition for mutation of names to which we have referred really amounted to a deed of gift. This clearly was not so. It amounted at the most to evidence of a gift. The learned District Judge dealt with it apparently as evidence of a gift only. He says that "these mutations are often made for the sake of convenience and are no evidence of exclusive possession." Then dealing with the verbal gift which was set up by the appellants in his Court he observes :—"The evidence in support of it is unreliable. The two witnesses who deposed to the gift were a Hindu and a Muhammadan of low position. I refuse to put trust in their halting statements." Mr. *Agarwala* on behalf of the appellants before us argued that the learned District Judge was not justified in not giving full effect to the petition in question as amounting to satisfactory and conclusive evidence of the alleged gift. We think that this contention

1907

PARBATI KUNWAR v. MAHMUD FATIMA.

goes too far. The petition is no doubt evidence of a gift, but it is not conclusive evidence. The parol evidence which was given in support of the gift entirely broke down in the opinion of the District Judge, and he, coming to the conclusion that the evidence was not satisfactory, found that no gift in fact was proved. This is a finding of fact behind which we cannot go. The question is not one of law but one of fact. In the case of *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (1) their Lordships of the Privy Council dealt with a similar argument to that which has been presented to us. In that case it was contended that an adoption was proved by certain documents which were adduced in evidence and their Lordships say (at page 617):—"There are thus concurrent findings against the appellant on this question, which is a question of fact, and the determination of which depends on the evidence. It was argued for the appellant that as this evidence to an important extent consists of writings, the ordinary rule that this Board will not disturb the judgment of both Courts on facts does not apply. Their Lordships cannot accept this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees, leases and other documents as evidence of the fact of adoption and of its consequences." So here the question is not a question of construction of the petition relied upon, but it is a question as to the effect to be given to that petition as evidence of the fact sought to be proved by it, namely, whether or not a gift of the village in question was made by the deceased in his lifetime. We, therefore, hold that upon this ground of appeal we are concluded by the finding of fact of the lower appellate Court.

The next question is whether or not the claim of the plaintiffs is multifarious. Both the lower Courts have held that it was not so. The claim, it is to be observed, is for the recovery from parties in possession, said to be wrongfully, of the plaintiffs' shares of property of their father to which they lay claim as two of his heirs. The contention is that inasmuch as the property passed out of the hands of members of the family at different times under two transfers and a decree, suits ought to have been brought

(1) (1894) I. L. R., 22 Calc., 609; 22 I. A., 51.

against the defendants separately in respect of the property of which each had possession. We are of opinion that this contention is untenable. We have been referred to the case of *Ganeshi Lal* v. *Khairati Singh* (1) as an authority for the proposition. But in our opinion that case is clearly distinguishable from the present. We think that in this case the plaintiffs had one cause of action only, namely, the right on the death of their father to recover their shares of his property, and that that cause of action accrued to them upon their father's death. If the authorities on the question of multifariousness are conflicting, two decisions of the Calcutta High Court commend themselves to us: one is in the case of *Ishun Chunder Hazra* v. *Rameswar Mondol* (2); and the other in the case of *Nundo Kumar Nasker* v. *Banomali Gayan* (3). In the first of these cases it was held by O'Kinealy and Hill, JJ., that in a suit for ejectment against several defendants, who set up various titles to different parts of the land claimed, there is only one cause of action, not several distinct and separate causes of action. That was a suit by reversioners to recover the estate of one Brahmamayi Debi from several persons who were in possession of her property under different titles. The Court held that "the cause of action, namely, what the plaintiffs were bound to prove in order to succeed, was that they were the reversioners of Brahmamayi Debi in regard to this property and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one." In the other case, which was a suit brought by the plaintiff in ejectment, claiming under a lease, in which he made his landlord a defendant to the suit on the allegation that the plaintiff having obtained a lease of the land from the landlord, and having obtained possession, was forcibly dispossessed by the defendants in collusion with the landlord, the defence of the defendants mainly was that the suit was bad for multifariousness inasmuch as they were severally in possession of distinct and definite portions of the land, under different demises, and that there was no community of interest between them. In delivering their judgment

(1) (1894) I. L. R., 16 All., 279. (2) (1897) I. L. R., 24 Calc., 831.
(3) (1902) I. L. R., 29 Calc., 871.

1907

PARBATI KUNWAR v. MAHMUD FATIMA.

Hill and Brett, JJ., say:—"The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. If this is so where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole, and not in fragments, and we think that all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to a suit in which he seeks to give effect to it." We agree with the learned Judges in this expression of their view of the law. We may also refer with approval to two decisions in this High Court in which the question of multifariousness was considered. The one is that of *Indar Kuar* v. *Gur Prasad* (1) and the other the case of *Mazhar Ali Khan* v. *Sajjad Husain Khan* (2).

For these reasons the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1907
January 5.

*Before Mr. Justice Richards.**

EMPEROR *v.* RADHE LAL AND OTHERS.

Act (Local No. III of 1901 *(United Provinces Land Revenue Act), sections* 147, 227 *and* 228—*Act No. XLV of* 1860 *(Indian Penal Code), section* 353—*Attachment—Power of Tahsildar to issue warrants of attachment for realization of revenue.*

Held that a Tahsildar has no power under the United Provinces Land Revenue Act, 1901, to issue a warrant of attachment in order to realize arrears

* Criminal Revision No. 630 of 1906.

(1) (1888) I. L. R., 11 All., 33. (2) (1902) I. L. R., 24 All., 358.